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No. 82-3
IN THE

Supreme Court of the United States

October Term, 1982

JOINT COUNCIL OF TEAMSTERS NO. 42 and Its Affiliated Local Unions, *et al.*,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.; BUILDING INDUSTRY ASSOCIATION OF CALIFORNIA, INC.; ENGINEERING CONTRACTORS ASSOCIATION, INC., SOUTHERN CALIFORNIA CONTRACTORS ASSOCIATION, INC.,

Respondents

ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC.,

Respondent,

CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION,

Respondent.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioners Joint Council of Teamsters No. 42 and its affiliated Local Unions ("Unions") reply to the opposing brief of Respondents Associated General Contractors of California, Inc., Building Industry Association of Califor-

nia, Inc., Engineering Contractors Association, Inc., and Southern California Contractors Association, Inc. ("Associations") as follows:

Principles of *Res Judicata* and Collateral Estoppel Are Inapplicable Here.

Respondent Associations have ignored fundamental principles of law by urging this Court to deny *certiorari* on the basis of *res judicata* or collateral estoppel (Respondents' brief, pp. 3-6).

Professor Moore has stated the applicable rubric succinctly:

> [T]he general rule is that a judgment has *no conclusive effect adverse to the winning litigant*, except insofar as it merges his cause of action if he was the plaintiff. This rule is based upon two considerations. First, any adjudication of an issue adverse to a litigant who nonetheless wins on another ground is not a dispositive adjudication, and the judgment that results does not depend upon that adjudication. Second, it would be unjust to [preclude] the winning litigant as to an issue adjudicated against him because, as the winning litigant, he was unable to seek appellate review of that adjudication, which he would have been entitled by statute to do had the lower court judgment gone against him [footnotes omitted] [emphasis added]. J. Moore, *Moore's Federal Practice* ¶ 0.416[5] (2d ed. 1976).

Respondent Associations duly enumerate some of the prerequisites for application of collateral estoppel (Respondents' brief, p. 4). They omit one exception:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue is *not* precluded in the following circumstances.

> (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action . . . . (emphasis added). *Restatement (Second) of Judgments* § 28 (1980).

In *AGC v. NLRB*, 564 F.2d 271 (9th Cir. 1977) both the Unions and the National Labor Relations Board ("Board") urged the lower Court not to reach the issue of the employment status of owner operators because that finding has been made in the course of an earlier representation hearing under Section 9(c) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 159(c) (1976). Further, if the issue was reached, the Unions argued that it was irrelevant because of the absence of a real question concerning representation. *Id.* at 564 F.2d 275. Contrary to the Unions' view, the Court found that it could reach the issue and reversed the Board. However, the Court then remanded the case to the Board which subsequently ordered dismissal. Thus, the Court accomplished a result favorable to the Unions but for reasons neither favorable to nor urged by the Unions.

This Court has held that "A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous . . . ." *Electrical Fittings Corporation v. Thomas & Betts Co.*, 307 U.S. 241, 242, 59 S. Ct. 860 (1939). *See also Public Service Commission v. Brashear Lines*, 306 U.S. 204, 59 S. Ct. 480 (1939). Thus, having obtained a favorable judgment for unfavorable reasons, the Unions had no opportunity to appeal the Ninth Circuit's holding.

Respondent Associations further assert that the Unions are precluded from litigating the employment status of owner operators because of this Court's holding in *Johnson Co. v. Wharton*, 152 U.S. 252, 14 S. Ct. 608 (1894) and

the Second Circuit's holding in *Winters v. Lavine*, 574 F.2d 46 (2d Cir. 1978).

The glaring distinction between the cited holdings and the instant matter is that they simply do not pertain to the inability of a prevailing party to appeal. Rather, they both are dependent upon "the fact that the *losing* party could not appeal [emphasis added]." *Id.* at 574 F.2d 62.[1]

Conclusion.

For the reasons originaliy urged, it is respectfully requested that *certiorari* issue to review the decision below.

Respectfully submitted,

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[1]Respondent Associations agree that the Unions were technically prevailing parties in the earlier adjudication (Respondents' brief p. 4) but argue alternatively that "any party" may petition this Court for review pursuant to 28 U.S.C. § 1254(1) (1976) (Respondents' brief p. 5). The statute has never been interpreted as broadly as Respondents suggest. *See* R. Stern and E. Gressman, *Supreme Court Practice* §§ 2.4, 6.17, 57-60, 433-434 (5th ed. 1978).